

should bear their own costs both of the trial in his Court and of the trial before the Penghulu.

I have three observations to make about this trial before the learned Magistrate. In the first place the Respondent, who had stated in his evidence in the Penghulu's Court that the \$5/- in question was a loan to the Applicant, suited his evidence on appeal to the revised basis of his claim and denied that he had lent any money to the Applicant. In the second place when the Applicant gave evidence that he never borrowed any money from the Respondent, or received any money from him for safe keeping, he was not cross-examined by Mr. Pillai who was appearing for the Respondent. In the third place the learned Magistrate made no note on the record of his reasons for directing that the costs should not follow the event, though it would seem that he ought to have done so pursuant to section 237 (ii) of the Civil Procedure Code. This sub-section provides that "Where the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing". I think that the words "shall state its reasons in writing" must refer to the date on which the decision itself is given, and that "grounds of judgment", which are only drawn up for the purposes of an appeal, cannot properly be regarded as a compliance with the provisions of this sub-section.

It may well be conceded that section 237 (i) of the Civil Procedure Code gives the Courts to which it applies a wide discretionary power to deal with the costs of all proceedings before them, and this view is borne out by the provisions of rule 1 of the 1932 Rules relating to costs in Magistrate's Courts. But wide though a Magistrate's discretion may be in regard to costs, it is nevertheless a judicial discretion and must be exercised on fixed principles. It must be exercised according to rules of reason and justice, not according to private opinion, or benevolence or sympathy. Thus it is well established that where a party successfully enforces a legal right, and in no way misconducts himself, then he is entitled as of right to his costs: See *Cooper v. Whittingham* (1880) 15 Chancery Division 501, and *Jones v. Curling* (1884) 13 Queen's Bench Division 265. On the same principle it seems to me that when a Defendant successfully resists a Plaintiff's claim, and has in no way misconducted himself, then he, too, is entitled as of right to his costs.

Applying this principle, which I have just enunciated, to the facts and proceedings in this case, I entertain no doubt whatever that the costs should have followed the event. There is not a shred of evidence that the Applicant misconducted himself in any way or at any time before or during the proceedings, and he has been put to no inconsiderable trouble and expense in his perfectly legitimate endeavours to get a wrong

judgment against himself set aside. In my opinion there was no material on which the learned Magistrate could have exercised a discretion in favour of the Respondent, and a perusal of his "grounds and supplementary grounds of judgment" certainly discloses none. So far as I can understand these grounds and supplementary grounds, he thought that he ought to treat the event as "a drawn match" (to quote his own words) because he was not at all clear as to what the true facts of the case might be. I am afraid that all judicial officers are frequently in some doubt as to what the true facts of a case may be, but that alone does not justify them in depriving a successful party of his costs.

For these reasons I am clearly of opinion that the learned Magistrate's order as to costs was wrong in law, and is therefore open to review by me under section 54 (ii) and (iii) of the Courts Enactment though the amount in dispute is only \$5/-. Indeed, Mr. Pillai, who appeared before me for the Respondent did not contend that it was right; but confined his argument to the suggestion that no appeal lies from a Magistrate's decision when he is sitting in appeal on a judgment of a Penghulu's Court. To that proposition I am not prepared to accede. The words used in section 54 (ii) and (iii) of the Courts Enactment are sufficiently wide to include such decisions and I can see no reason why they should be read otherwise than in their normal and popular sense.

In the result the Magistrate's order as to costs must be set aside, and the Applicant must have his costs of the proceedings in this case both in the Court of the Penghulu and in the Court of the learned Magistrate. I also award him the costs of his petition to me and of the hearing and judgment consequent thereon. The Court below to carry out these orders.

Appeal allowed with costs.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.A.

March 25, 1939.

CHOW TUCK HENG.....Plaintiff
vs.
SOONG SOOI.....Defendant.

[BENTONG CIVIL SUIT No. 2 of 1937]

Limitation Enactment (Cap. 18) s.19—payment of interest by agent—lien-holder not a chargee—receipt of produce may operate as payment of interest.

Notwithstanding that a lien-holder is not a chargee within section 19 (ii) of the Limitation Enactment (Cap. 18) the receipt of produce from a duly authorised agent of the debtor may operate as an effective payment of interest.

W. G. W. Hastings for the Plaintiff.

S. M. Sharma for the Defendant.

TERRELL, J.A.—The real Plaintiffs in this suit are the Kongsai Association of Bentong who claim to be beneficially entitled to the moneys due on a Promissory Note signed by the Defendant and made in favour of the Association.

The original Plaintiff in the record was one Chan Sang, and he purported to sue as the public officer of the Society registered under the Societies Enactment Cap. 96. On the second day of the hearing, however, it transpired that no officer had in fact been designated or registered as the person entitled to sue on behalf of the Society under the provisions of section 29(1) of the Enactment. Mr. Hastings accordingly applied to amend the proceedings, and on the 2nd November 1938 an order was made giving leave to Chow Tuck Heng to sue on behalf of himself and all other members of the Association.

The necessary amendments having been made, the further hearing of the suit was continued before me on the 21st March 1939. The only defence relied on was that of limitation. The history of the transaction is as follows. The Defendant originally borrowed a sum of \$400 in 1926 at 24% p.a. He paid certain sums on account of interest, but by the 29th May 1931 there was a sum of \$251.18 in arrear. Thereupon accounts were gone into, and the Defendant executed a Promissory Note for \$650, the balance of \$1.18 being written off. When he signed the Promissory Note for \$650 the Defendant also deposited E.M.R. No. 1701, Mukim of Bentong, as security. The Plaintiffs have registered a caveat, and accordingly are entitled to a registered lien under section 134 of the Land Code.

Soon after the execution of the Promissory Note the Defendant left for China, and has only recently returned. The amount due on the Promissory Note is immediately payable, and accordingly an action on the Note would be barred by limitation in three years. The Plaintiffs, however, rely on certain payments on account of interest as extending the limitation period under the provisions of section 19 of the Limitation Enactment (Cap.18).

The payments alleged are as follows:—

27.11.1931	By cash in payment of interest	\$20.00
5. 4.1932	By cash in payment of interest	6.00
1933	By cash (Proceeds of sale of rubber)	79.35
1934	By cash (Proceeds of sale of rubber)	59.95
29. 5.1935	By cash in payment of interest	20.00
18.11.1935	By cash in payment of interest	25.00

All these payments are duly entered in the Association books, and credited to the Defendant as interest upon his loan. The material portions of section 19 of the Limitation Enactment read as follows:—

S 19 (i) When interest on a debt.... is before the expiration of the prescribed period paid as such by the person liable to pay the debt.....or by his agent duly authorised on his behalf,.....a new period of limitation according to the nature of the original liability shall be computed from the time when the payment was made.

19(ii) When charged land is in the possession of the chargee the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section.

The Defendant argues (1) that interest was not paid *as such* and (2) that if any money were paid it was not paid by an agent duly authorised on his behalf.

No evidence was called by the Defendant, and it is only necessary to consider the evidence with regard to the various payments called by the Plaintiffs.

As regards the first payment of \$20, this was stated by Chow Tuck Heng to have been made by the defendant's cousin, one Fong San. The next payment of \$6 was stated by Lai Ying Lan, the Association's clerk, to have been made by one Leong Chu, who was a tapper employed on the defendant's land. These sums were both entered in the Association's books as payments on account of interest, but there is no evidence that either Fong San or Leong Chu were authorised by the defendant to make such payments, and no attempt was made to call either of them as a witness.

The position with regard to the items of \$79.35 and \$59.95 is rather different. It appears that in 1933 the defendant's younger brother Foong Yip Chee was in charge of the land held under the E.M.R. deposited with the Plaintiff. The Association demanded the interest due, and thereupon Foong Yip Chee asked Tuck Heng to take possession of the land and tap the rubber. This the Association did for two years and the items of \$79.35 and \$59.95 are the net proceeds from the sale of rubber after payment of expenses. At the end of 1935 Foong Yip Chee asked for the return of the rubber coupons book and for an account of his brother's loan which was duly given to him, Ex.1. This account shows quite clearly that, after crediting the sums of \$20, \$6, \$79.35 and \$59.95 on account of interest, there was a balance due on account of interest of \$354.70. The account runs up to the 30th day of the 8 moon 23rd year of the Republic corresponding to 30th August 1934.

The questions whether interest was paid as such, and whether the agent was duly authorised to make the payments are clearly questions of fact, *Jago v. Mahadeo* (1921) A.I.R. (Nagpur) p.95, and I think there is little difficulty in inferring from the fact that Foong Yip Chee was put into possession of the defendant's land and that the Plaintiffs have given *prima facie* evidence of an agreement that the produce of the land should be taken on account of the interest, that Foong Yip Chee was authorised to enter into the arrangement. This conclusion is strengthened by the fact that when Foong Yip Chee received the account Ex.1 in 1934 he raised no objection thereto, and by the presumption which arises from the fact that both the defendant and Foong Yip Chee were present at the hearing before me, and neither of them was called to give evidence in rebuttal.

I do not think that the Plaintiffs come strictly within the terms of section 19 (ii) of the Enactment as they were only lien holders and not chargees. There is no reason, however, why an arrangement such as has been set out above should not be made, and if made, why it should not operate as an effective payment of interest as such. It is laid down in some of the Indian cases that the true test is whether the payments made are of such a nature that they would provide a defence *pro tanto* to a suit to recover the interest (See *Mylan v. Annavi Madan* I.L.R. 29 Madras p.234), and if that ruling is applied, there can be no doubt that the Plaintiffs in this case would be estopped from denying the payments which are recorded in their books as interest. As, however, there are other authorities in India to the effect that a mere allocation by the creditor is not sufficient, I prefer to rest my conclusions on the specific agreement referred to above.

The net proceeds of the rubber, therefore, which were received by the Plaintiffs in 1933 and 1934 must be taken as payments of interest, and result in a new period of limitation. Since the payment in 1933 was well within the limitation period, it is not necessary to make any finding with regard to the payments in 1931 and 1932.

Since, however, the last payment in 1934 was made on the 30th August and the plaint was not filed until November 1937, the new period of limitation had also run out unless payments of interest before the expiration of the new period can be established. According to Lai Ying Lan, the clerk of the Association, Foong Yip Chee paid him the sum of \$20 on the 29th May 1935 and the sum of \$25 on the 18th November 1935. Both these sums appear in the Day Book, and in the ledger are shown as payments on account of interest. In view of the fact that Foong Yip Chee was the agent of the Defendant for the purpose of paying interest on the loan by entrusting the Plaintiffs with the collection and sale of the rubber, I find no difficulty in finding that he acted as the defendant's agent in making the payments in 1935 and that such payments were made as interest.

In my opinion, therefore, the plea of limitation fails and there will be judgment for the Plaintiffs in terms of paragraphs (i), (ii), (iii) and (iv) of the prayer. The question of costs will be reserved for further argument.

Subsequently.—Plaintiff to have costs of action excluding costs of amendment of plaint, and of hearing on the 2nd November 1938.

*Judgment for Plaintiff with
Costs limited as above.*